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Lori Houck Cora
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 10, ORC-158
1200 Sixth Avenue
Seattle, WA 98101

Re: Lamprey protection level

Dear Lori,

The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) is in receipt of your emails of March 20, 2008, April 30, 2008 and the attached Lower Willamette Group (LWG) memo regarding Pacific lamprey (lamprey). The matter has been referred to me for response.

Thank you for providing the LWG memo as it was not provided to the Yakama Nation by submitter or the PRP group. In contrast, this response is being provided to the PRP counsel who provided the LWG Memo to you, and to counsel for the entities who have taken the lead in the LWG.

Requested Action - For the reasons set out below, the Yakama Nation requests that the Environmental Protection Agency NOT alter its prior decision to protect lamprey on an individual level. In other words, it is requested that EPA reject LWG's request to reduce lamprey protection to a population level.

EPA Present Lamprey Protection Level Position - In February 2008 EPA took the position that lamprey was a "special-status species" that would be evaluated on an "individual organism level."

"[Pacific Lamprey] is a special-status species and will be evaluated at the more conservative individual organism level in the risk characterization."

Problem Formulation for the Baseline Ecological Risk Assessment at the Portland Harbor Site, February 15, 2008, p. 26, fn.2. (emphasis added)

EPA Discretion – It is within EPA’s discretion to assess lamprey on either an individual or population basis. The LWG Memorandum p. 1 concludes that “...EPA guidance does not require assessment [of lamprey] on an individual basis” Id. With this general statement the Yakama Nation agrees. However, nothing in the guidance precludes such consideration on an individual basis. EPA’s prior determination to assess lamprey on an individual basis was within EPA’s discretion and there is no reason to reverse that position. *Problem Formulation for the Baseline Ecological Risk Assessment at the Portland Harbor Site*, February 15, 2008, p. 26, fn.2.

Treaty Protected Species- Lamprey is a Treaty protected species. The Treaty of June 5, 1855 between the United States and the Yakama Nation, reserves to the Yakama people

...the right of taking fish at all usual and accustomed places, in common with citizens of the Territory,...

Treaty of June 5, 1855, Article III

Individual Protection for Treaty-Protected Species, Coeur d’Alene Basin – In the Coeur d’Alene Basin cleanup, migratory waterfowl was protected on an individual level because of their Treaty protected status under the Migratory Waterfowl Treaty between the United States and Canada. The same consideration should be afforded lamprey under the Treaty of June 9, 1855.

Both treaties were negotiated by the Executive Branch and ratified by the Senate under Article II § 2 of the United States Constitution and are the “supreme law of the land” under Article VI of the United States Constitution.

LWG Recognition of Lamprey’s “Special Cultural Significance” - The Memorandum submitted by the Lower Willamette Group (LWG), p. 2, concedes that the LWG recognizes lamprey as a “species of special cultural significance... .” Id.

Lamprey Significance Federally Recognized – Recently, an Agreement was signed between the United States’ Department of Defense (Army Corps of Engineers, Department of the Interior (Bureau of Reclamation), Bonneville Power Administration (BPA), the Yakama Nation and two other Tribes involved at Portland Harbor (Confederated Tribes of the Umatilla Indian Reservation and Confederated Tribes of the Warm Springs Reservation of Oregon). 3 *Treaty Tribes-Action Agency Agreement*, signed April 4, 2008.

In the Agreement, the United States specifically recognized lamprey as a “significant” species.

The Parties understand that the Pacific Lamprey is a species of fish that is significant to the wellbeing of the Tribes, who use these fish for food and medicine. Lamprey abundance has diminished in the Columbia Basin in the last

30 years and this diminishment is of high concern to the Parties. The Parties agree to undertake the actions to protect lamprey described below and in Attachment B.

Id. at p.6 (emphasis added)

Lamprey Protection / Agreement Not to Petition for Listing – The Yakama Nation does not dispute the determination not to list lamprey as an endangered species referenced at p.2 of the LWG Memorandum, but does note the unique limiting circumstances of that determination. Nevertheless, the Yakama Nation's concern regarding lamprey was such that serious consideration was given to petitioning for listing. The above referenced *3 Treaty Tribes-Action Agency Agreement* addressed the matter.

The Parties will work together to combine Action Agencies, Tribal, and other agency lamprey actions into a comprehensive lamprey improvement program. Beginning in 2008, the Parties and the Tribes will meet periodically to discuss the lamprey implementation and funding issues including priorities and impediments.

The Parties agree that being proactive for lamprey is critical to seek to avoid ESA listing. The Tribes' commitments to forbearance regarding lamprey as described in Section IV.B are contingent on good faith implementation of the actions described in this lamprey section of this Agreement.

Material modifications of the lamprey implementation and related funding under Section II.H may, after resort to the Dispute Resolution provisions, result in modification of the Forbearance provision regarding lamprey.

...
[T]he Action Agencies' commitments under this Agreement for lamprey actions are adequate for the duration of this Agreement such that the Tribal parties will not petition to list lamprey or support third party efforts to list lamprey as threatened or endangered pursuant to the ESA.

Id. at p.6, 21 (emphasis added)

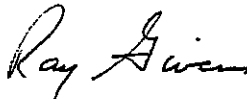
This demonstrates the critical condition of lamprey, and supports EPA's decision to address lamprey on an individual basis at Portland Harbor. It also would be surprising, if not disingenuous, for one branch of the United States government (EPA) to reduce the protection afforded lamprey immediately after other branches of the United States government (Departments of Defense and Interior and BPA) extracted the concession from the Yakama Nation and other Tribes to not petition for listing of lamprey as an endangered species.

Conclusion – Lamprey should be protected to an individual level for several reasons. These include:

- EPA's current position is to protect lamprey to the individual level, and there is no justification to reduce that protection to community level.
- EPA has discretion regarding the level of protection (individual versus community) to be afforded species such as lamprey in conducting risk assessments, and there is no reason for EPA to reverse its current exercise of that discretion.
- Lamprey is a Treaty-protected species and EPA Region X has protected other Treaty-protected species within the Columbia River watershed to an individual basis even though they did not have formal threatened or endangered status.
- Lamprey has been recognized by LWG as being a "species of special cultural significance."
- Lamprey has been recognized by other branches of the United States government as a "species of fish that is significant to the wellbeing of the Tribes."
- It would be most unusual for EPA to reduce lamprey protection immediately after other branches of the United States government extracted as consideration in a formal Memorandum of Agreement a concession from the Yakama Nation and other Tribes involved at Portland Harbor to not Petition or support the listing of lamprey as an endangered species.

For the above stated reasons, it is requested that EPA reject LWG's request to reduce the level at which lamprey will be addressed in the risk assessments. Thank you for your consideration. If you have any questions, please contact me.

Sincerely,



Raymond C. Givens
Attorney for the Yakama Nation

Cc Portland Harbor Natural Resource Trustee Council
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